

Jul 22, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

KEVIN CUNNINGHAM; JENA
GERKEN; ERIC MATTOX; KEVIN
MILLER; TOM PERKINS; DEVON
REESE; CHAD RILEY; DON
ROBERT; KELVIN SCHUMAN;
SCOTT SIMARD; RICHARD
STILES; SEAN STREGE and SEAN
BARAJAS,

Plaintiffs,

v.

MISSION SUPPORT ALLIANCE,
LLC, a Delaware corporation,

Defendant.

NO: 4:18-CV-5060-RMP

ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND GRANTING IN
PART AND DENYING IN PART
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Plaintiffs, a group of current and former Platoon Captains for the Hanford Fire
Department ("Captains") employed by Defendant Mission Support Alliance, LLC,
("MSA") challenged MSA's decision to classify the Captains as exempt from the
Fair Labor Standards Act's overtime pay rule. MSA argued that the Captains'

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART
AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ~ 1

1 primary duty was managing other firefighters and managing fire stations, which
2 would exempt them from the FLSA's mandatory overtime pay rule because their
3 primary duty was management. The Captains argued that none of the exemptions
4 applied to them because their primary duty is as emergency responders, not
5 managers. The parties also dispute the appropriate method of calculating any
6 potential damages.

7 After reviewing the extensive briefing in this matter and considering the
8 parties' arguments and the applicable law, the Court concludes that the Captains'
9 primary duty is as emergency responders, and therefore, they are not exempt from
10 the FLSA's overtime pay rule. Additionally, the Court concludes that the Captains
11 should be paid overtime via the fluctuating workweek calculation method, that the
12 Captains are entitled to liquidated damages, and that the statute of limitations for
13 damages extends back two years. Therefore, the Court grants in part each party's
14 motion for summary judgment and denies in part each party's motion for summary
15 judgment.

16 **BACKGROUND**

17 The Captains are thirteen current and former Fire Platoon Captains employed
18 by MSA to work at the Hanford Fire Department. ECF No. 1 at 4. The United
19 States contracted with MSA to provide fire department services for the Department
20 of Energy's Hanford Site outside of Richland, Washington. ECF No. 37-3 at 5. The
21 **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART
AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ~ 2**

1 Hanford Fire Department operates out of three fire stations, each tasked with
2 responding to emergencies within or just outside of the Hanford Site. ECF No. 37-
3 38 at 23.

4 The Hanford Fire Department utilizes a multi-tiered system of firefighter
5 ranks that proceeds as follows from lowest ranked to highest: Fire Fighter,
6 Lieutenant, Captain (also called Platoon Captain), Battalion Chief, and Chief. ECF
7 No. 37-38 at 19. Between the three stations, four Captains (or Lieutenants acting as
8 Captains) are always on duty. *Id.* at 37. The Captains work 48-hour shifts, or two
9 days, and then get 96 hours, or four days, off, resulting in a regular workweek of
10 either 48 or 72 hours. *Id.* at 26. Captains that worked prior to January 1, 2016,
11 worked a schedule known as “Modified Detroit,” in which the Captain would work a
12 24-hour shift, then receive a 24-hour rest period, work another 24-hour shift, receive
13 another 24-hour rest period, work another 24-hour shift, and then receive 96 hours,
14 or four days, of rest. *Id.* at 25. The result would be the same number of hours in a
15 given workweek: the Captains would work either 48 hours or 72 hours. *Id.* at 40.
16 Regardless of which schedule was used, when the Captains worked more than forty
17 hours in a workweek, they were not compensated with time-and-one-half overtime
18 pay because they were considered exempt from the FLSA’s overtime pay
19 requirement. ECF No. 37-40 at 4; ECF No. 39-3 at 8.

1 The Hanford Fire Department's stations are equipped with several different
2 vehicles that may be used to respond to an emergency call. ECF No. 37-42 at 25–
3 26. Any vehicle that is assigned to be used to respond to an emergency must be used
4 to respond to that emergency, and a vehicle cannot leave unless all members,
5 including a Captain, are onboard. ECF No. 37-42 at 21; ECF No. 37-38 at 66. A
6 Captain cannot refuse to respond to a call if a call comes in for one of that Captain's
7 vehicles; therefore, the Captain must stop whatever the Captain is currently doing,
8 including sleeping, to respond to the call. ECF No. 37-42 at 52.

9 When Captains arrive on the scene of the emergency, they assume command
10 of the emergency response if they are the most senior officer present. ECF No. 37-
11 31 at 8. The types of emergencies to which the Captains might respond include
12 fires, medical emergencies, rescue operations, and hazmat related incidents. ECF
13 No. 37-35 at 6. Along with directing lower-ranked firefighters, the Captains handle
14 hoses and engage in rescue operations as necessary for each emergency response.
15 ECF No. 37-31 at 8. The Captains wear the same protective equipment as the other
16 firefighters on scene. *Id.*

17 Based on the calculation of emergency response data between April of 2015
18 and December of 2018, the Captains spent less than 3% of their time on duty
19 responding to emergency calls. ECF No. 40-4 at 5–6. When not responding to
20 emergencies, the Captains are stationed at one of the three Hanford Fire Department

1 stations. ECF No. 37-42 at 19. They ensure that the vehicles are stocked with
2 supplies and that the vehicles' systems, such as the fire hoses, are operational. ECF
3 No. 37-31 at 5. The Captains also complete the same training that other firefighters
4 are expected to complete, which relates to the Captains' physical fitness and
5 preparedness for responding to certain types of emergencies. ECF No. 37-38 at 54–
6 59.

7 The Captains supervise the day-to-day activities of subordinate employees and
8 delegate them tasks. ECF No. 39-25 at 4; ECF No. 39-19 at 9. The Captains initiate
9 requests for station repairs and supplies. ECF No. 39-26 at 10. They prepare
10 incident reports after responding to emergencies. ECF No. 39-22 at 8. The Captains
11 also create pre-incident plans by touring certain facilities within the response range
12 of the Hanford Fire Department “to provide information to responding personnel to
13 help them safely and effectively manage emergencies with available resources.”
14 ECF No. 39-4 at 2. The Captains do not have the authority to discipline subordinate
15 employees. ECF No. 37-42 at 83. They do not create or alter department policies.
16 ECF No. 37-38 at 73. The Captains can make recommendations as to equipment
17 purchases and supplies but they cannot make the decision to spend the Department's
18 money. *Id.* at 74. They are not expected to write performance evaluations for
19 subordinate officers. *Id.*

1 For their work, the Captains are paid a fixed weekly salary that does not
2 change depending on the number of hours that the Captains are scheduled to work in
3 a given workweek. ECF No. 39-3 at 22. The only exception is if the Captains
4 worked unscheduled overtime, which is any work “outside the normal schedule of
5 hours,” they are paid “at the base straight time rate” for the unscheduled overtime.
6 *Id.* at 23.

7 The Captains filed this complaint, claiming that they were denied overtime
8 pay in violation of the FLSA’s overtime pay rule under 29 U.S.C. § 207(a). ECF
9 No. 1. MSA argued that the Captains are exempt from overtime pay because they
10 are highly compensated employees. ECF No. 14. Both parties filed motions for
11 summary judgment. ECF Nos. 36 & 38.

12 **LEGAL STANDARD**

13 When parties file cross-motions for summary judgment, the Court considers
14 each motion on its own merits. *See Fair Housing Council of Riverside Cty., Inc. v.*
15 *Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001). A court may grant summary
16 judgment where “there is no genuine dispute as to any material fact” of a party’s
17 prima facie case, and the moving party is entitled to judgment as a matter of law.
18 Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23
19 (1986). A genuine issue of material fact exists if sufficient evidence supports the
20 claimed factual dispute, requiring “a jury or judge to resolve the parties’ differing

21 ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS’
MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART
AND DENYING IN PART DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT ~ 6

versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987). A key purpose of summary judgment “is to isolate and dispose of factually unsupported claims.” *Celotex*, 477 U.S. at 324.

DISCUSSION

The Fair Labor Standards Act’s Overtime Rule

The Fair Labor Standards Act (“FLSA”) provides that employees who work more than forty hours in a workweek shall be paid “at a rate not less than one and one-half times the regular rate at which he is employed” for every hour worked over forty. 29 U.S.C. § 207(a)(1). The Act provides many exemptions to the overtime pay rule and authorizes the Secretary of Labor to promulgate regulations creating and defining exemptions. 29 U.S.C. § 213(a). If an exemption applies to a certain employee, the overtime pay rule “shall not apply” to that employee. *Id.* An employer has the burden to prove that an exemption applies. *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1124 (9th Cir. 2002).

Since the FLSA’s enactment, its exemptions have been narrowly construed against the employers. *See Mitchell v. Ky. Fin. Co.*, 359 U.S. 290, 295 (1959). However, the Supreme Court recently reversed this rule because the FLSA gives no “textual indication” that its exemptions should be narrowly construed. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018). “The narrow- construction principle relies on the flawed premise that the FLSA pursues its

remedial purpose at all costs.” *Id.* Now, instead of a narrow construction, the exemptions must be given a “fair reading.” *Id.*

The Highly Compensated Employee Exemption

Applying the FLSA’s overtime rule to the Captains, there is no dispute between the parties that the Captains have worked over forty hours a week in the past and that they were not paid FLSA overtime compensation for those hours worked over forty. *See* ECF No. 37-7 at 2 (defining the Captains’ work schedule as containing a mix of 72-hour and 48-hour workweeks); ECF No. 37-6 at 13 (defining the Captains’ overtime). However, the parties dispute whether the captains are exempt from the FLSA’s overtime pay rule under the highly compensated employee exemption. ECF No. 36 at 33; ECF No. 38 at 11.

Highly compensated employees are exempt from mandatory overtime pay under the FLSA. 29 C.F.R. § 541.601. A highly compensated employee is an employee who (1) receives a total annual compensation of at least \$100,000 at a weekly rate of \$455 or more; (2) “customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee”; and (3) “has a primary duty that includes performing office or non-manual work.” *Id.*

The Compensation Element

1 The first element of the highly compensated employee exemption is that the
2 employee receives a total annual compensation of at least \$100,000 at a weekly rate
3 of \$455 or more. 29 C.F.R. § 541.601. MSA argues that the Captains' salaries
4 meets both standards. ECF No. 38 at 15; ECF No. 39-8 at 7 (defining the Captains'
5 weekly rate as above \$455); ECF No. 39-14 at 7 (proving that the Captains made
6 over \$100,000 for each relevant year, except for Mr. Mattox in 2015). These facts
7 are not refuted by the Captains. Therefore, the Court finds that MSA has proven that
8 the Captains meet the first element of the highly compensated employee exemption.

9 ***The Performance of Certain Exempt Duties Element***

10 The second element of the highly compensated employee exemption is that
11 the employee "customarily and regularly performs any one or more of the exempt
12 duties or responsibilities of an executive, administrative, or professional
13 employee." 29 C.F.R. § 541.601(a)(2). A duty is "customarily and regularly"
14 performed if it is performed "at a frequency that must be greater than occasional
15 but which, of course, may be less than constant." 29 C.F.R. § 541.701. "Tasks or
16 work performed 'customarily and regularly' includes work normally and
17 recurrently performed every workweek; it does not include isolated or one-time
18 tasks." *Id.*

19 MSA argues that the Captains customarily and regularly perform the same
20 duties as an executive, administrative, or professional employee, such as the

1 management of the Hanford Fire Department, the performance of work directly
2 related to the Fire Department's business operations, or the performance of work
3 requiring an advanced degree in science. ECF No. 38 at 15; 29 C.F.R. §§ 541.100,
4 541.200, 541.300. The Captains do not dispute MSA's arguments. Therefore, the
5 Court finds that MSA has proven that the Captains meet the second element of the
6 highly compensated employee exemption.

7 ***The Primary Duty Element***

8 The third element of the highly compensated employee exemption is that the
9 employee's primary duty "includes performing office or non-manual work." 29
10 C.F.R. § 541.601(d). The parties dispute whether the Captains' primary duty
11 includes performing office or non-manual work. ECF No. 36 at 18; ECF No. 38 at
12 9.

13 To identify an employee's primary duty, the court identifies the "principal,
14 main, major or most important duty that the employee performs." 29 C.F.R. §
15 541.700(a). Determining an employee's primary duty must be done "based on all
16 the facts in a particular case, with the major emphasis on the character of the
17 employee's job as a whole." *Id.* Factors to consider in the primary duty analysis
18 "include, but are not limited to, the relative importance of the exempt duties as
19 compared with other types of duties; the amount of time spent performing exempt
20 work; the employee's relative freedom from direct supervision; and the

1 relationship between the employee's salary and the wages paid to other employees
2 for the kind of nonexempt work performed by the employee." *Id.*

3 In 2006, the DOL offered guidance on determining the primary duty and
4 exempt status of first responders, including firefighters. 29 C.F.R. § 541.3(b)(1).
5 Specifically, the DOL states that the executive, administrative, and professional
6 overtime pay exemptions "do not apply to . . . fire fighters . . . regardless of rank or
7 pay level, who perform work such as preventing, controlling or extinguishing fires
8 of any type [or] rescuing fire, crime or accident victims." *Id.* The exemptions
9 typically do not apply to firefighters because "their primary duty is not
10 management of the enterprise in which the employee is employed . . . the
11 performance of work directly related to management or general business
12 operations of the employer or the employer's customers . . . [or] the performance
13 of work requiring knowledge in an advanced type in a field of science or learning."
14 29 C.F.R. § 541.3(b)(2)–(4). Although not in the text of the regulation itself, the
15 DOL also stated in the first responder regulation's preamble that "fire fighters . . .
16 also cannot qualify as exempt under the highly compensated test in final section
17 541.601" because the firefighters' primary duty typically does not include the
18 performance of office or non-manual work. 69 Fed. Reg. 22,122, 22,129–30

19 Case law has established that the first responder regulation does not supplant
20 the primary duty analysis when determining the exempt status of certain first

1 responders. *Morrison v. Cty. of Fairfax, Va.*, 826 F.3d 758, 767 (4th Cir. 2016).
2 Instead, the first responder regulation “clarifies the application of the primary duty
3 test to first responders like the Platoon Captains, through the example offered in
4 subsection (b)(2),” namely, that firefighters are not exempt employees “merely
5 because the . . . fire fighter also directs the work of other employees in the conduct
6 of . . . fighting a fire.” *Id.* The first responder regulation declares a broad principle
7 that “management-like tasks undertaken in conjunction with, or directly related to,
8 primary first responder duties do not turn a first responder into an exempt
9 executive or administrator.” *Id.* (citing *Mullins v. City of N.Y.*, 653 F.3d 104, 115
10 (2d Cir. 2011)).

11 The Court first employs the primary duty analysis factors from the DOL’s
12 regulations: “the relative importance of the exempt duties as compared with other
13 types of duties; the amount of time spent performing exempt work; the employee’s
14 relative freedom from direct supervision; and the relationship between the
15 employee’s salary and the wages paid to other employees for the kind of
16 nonexempt work performed by the employee.” 29 C.F.R. § 541.700(a). The first
17 factor favors the Captains. Regardless of what the Captains are doing at the
18 station, the Captains must be prepared to leave the station in response to an
19 emergency call in one minute during the day and in two minutes at night. ECF No.
20 37-38 at 68. The Captains do not have a choice; if their vehicle is assigned to be

1 used to respond to an emergency call, the Captains must respond to the call. ECF
2 No. 37-42 at 52; ECF No. 37-43 at 7. Because responding to emergency calls
3 takes preference over any other activity that the Captains might be doing at the
4 station, and because responding to an emergency is a non-exempt duty, the first
5 factor favors the Captains. 29 C.F.R. § 541.700(a).

6 The second primary duty analysis factor is the amount of time spent
7 performing exempt work. 29 C.F.R. § 541.700(a). The DOL advises that the
8 “amount of time spent performing exempt work can be a useful guide in
9 determining whether exempt work is the primary duty of an employee.” 29 C.F.R.
10 § 541.700(b). For example, employees who spend more than half of their time
11 performing exempt work “will generally satisfy the primary duty requirement” for
12 that specific exemption. *Id.* “Time alone, however, is not the sole test, and
13 nothing in this section requires that exempt employees spend more than 50 percent
14 of their time performing exempt work.” *Id.*

15 The Captains spend most of their time waiting to respond to calls. Based on
16 the calculation of emergency response data between April of 2015 and December
17 of 2018, the Captains spent less than 3% of their time on duty responding to
18 emergency calls. ECF No. 40-4 at 5–6. This means that more than 97% of the
19 Captains’ time is spent at the station, waiting for the calls to come in. *Id.* But the
20 Captains are not without work during the downtime. The Captains supervise the

1 day-to-day activities of Fire Fighters and Lieutenants and delegate them tasks.
2 ECF No. 39-25 at 4; ECF No. 39-19 at 9. The Captains initiate requests for station
3 repairs and supplies. ECF No. 39-26 at 10. They prepare incident reports after
4 responding to emergencies. ECF No. 39-22 at 8.

5 However, the Captains complete various duties to ensure that they, and the
6 rest of the firefighters at the station, are prepared for emergency response. They
7 participate in, and ensure others have completed, training regiments created by a
8 training group that ensure that the firefighters are prepared for future emergency
9 responses. ECF No. 39-29 at 8. The Captains are responsible for ensuring that the
10 emergency response vehicles and equipment are operational and safe for use. ECF
11 No. 39-26 at 10. The Captains also create pre-incident plans by touring certain
12 facilities within the response range of the Hanford Fire Department “to provide
13 information to responding personnel to help them safely and effectively manage
14 emergencies with available resources.” ECF No. 39-4 at 2.

15 Thus, while the Captains only spend a minimal amount of time responding
16 to emergencies and another amount of time completing administrative or
17 managerial tasks, a good portion of the Captains’ time is spent preparing for the
18 next emergency response. Indeed, the very nature of emergency response work
19 involves waiting for the next call. “Any given day for a fire fighter may consist of
20 extended periods of boredom, punctuated by periods of urgency and moments of

1 terror.” *Barrows v. City of Chattanooga, Tenn.*, 944 F. Supp. 2d 596, 605 (E.D.
2 Tenn. 2013). Additionally, the recitation of duties does not include normal things
3 that the Captains do during their time on duty, such as eating or sleeping. *See* ECF
4 No. 37-6 at 21. Considering the undisputed facts, the Court concludes that the
5 Captains spend less than 50 percent of their time performing management-type
6 work. 29 C.F.R. § 541.700(b). Therefore, the Court finds that the second primary
7 duty factor weighs in favor of the Captains.

8 The third primary duty factor is the employee’s relative freedom from direct
9 supervision. 29 C.F.R. § 541.700(a). The Captains are senior to Lieutenants and
10 Fire Fighters and are subordinate to Battalion Chiefs and the Fire Chief. ECF No.
11 37-38 at 11. Oftentimes, the Captains are the most senior officers present at a
12 station, leaving the Captains with the responsibility of managing the station’s
13 affairs. ECF No. 39-16 at 7. Nonetheless, there is always a Battalion Chief on
14 duty, and the Captains must follow the Battalion Chief’s orders. ECF No. 37-14 at
15 11; ECF No. 37-42 at 5–6. The Court finds that the third factor does not favor
16 either party.

17 The fourth primary duty factor is the relationship between the employee’s
18 salary and the wages paid to other employees for the kind of nonexempt work
19 performed by the employee. 29 C.F.R. § 541.700(a). In *Morrison*, the Fourth
20 Circuit found that this factor favored the fire captains when undisputed evidence

1 showed that the rank below the fire captains, also called lieutenant, made more
2 money than the fire captains when you factored in overtime pay, resulting in some
3 lieutenants requesting that their promotions to fire captain be delayed. *Morrison*,
4 826 F.3d at 771–72. Similar testimony or evidence was not provided in this case,
5 and the record shows that Captains have a larger weekly salary than the
6 Lieutenants or Fire Fighters below them. *See* ECF No. 39-8 at 5–7. The fourth
7 primary duty factor favors MSA.

8 However, the suggested primary duty factors are not exhaustive. 29 C.F.R.
9 § 541.700(a) (“Factors to consider when determining the primary duty of an
10 employee include, but are not limited to . . .”). The main inquiry is determining the
11 “principal, main, major or most important duty that the employee performs . . .
12 with the major emphasis on the character of the employee’s job as a whole.” *Id.*
13 Here, the principal, main, major, or most important duty that the Captains perform
14 is emergency response. Regardless of the time of day or whatever the Captains
15 already are doing, if an emergency call comes in and a Captain’s vehicle is
16 assigned to the call, the Captain must respond to the call, and his vehicle cannot
17 leave without him. ECF No. 37-42 at 52; ECF No. 37-43 at 7.

18 The first responder regulation supports this outcome. The first responder
19 regulation does not replace the primary duty analysis, but it does clarify that first
20 responders are not exempt employees “merely because [the first responder] also

1 directs the work of other employees in the conduct of an investigation or fighting a
2 fire.” 29 C.F.R. § 541.3(b). In fact, the regulation’s preamble states that “high-
3 level police and fire officials” are exempt if their primary duties are managerial,
4 such as evaluating performance, enforcing and imposing penalties, making
5 personnel recommendations, coordinating and implementing training programs,
6 maintaining payroll and personnel records, handling community complaints,
7 preparing budgets and controlling expenses, ensuring operational readiness by
8 inspecting personnel and equipment, deciding how to allocate personnel, managing
9 distribution of equipment, and maintaining inventory of property and supplies. 69
10 Fed. Reg. at 22,130.

11 The undisputed facts show that although the Captains play a role in the
12 activities considered by the first responder regulation to be exempt activities, the
13 Captains do not have the final authority on any of those decisions. The Captains
14 do not have the authority to discipline subordinate employees. ECF No. 37-42 at
15 83. They do not create or alter department policies. ECF No. 37-38 at 73. The
16 Captains can make recommendations as to equipment purchases and supplies but
17 cannot authorize the expenditure of the Department’s money. *Id.* at 74. They are
18 not expected to write performance evaluations for subordinate officers. *Id.* The
19 Captains are ultimately the people who call and offer overtime to off-duty
20 firefighters when vacancies need to be filled, but the Captains perform this duty as

1 a part of an predetermined process negotiated in the collective bargaining
2 agreement (“CBA”) without the authority to bypass the process. ECF No. 37-42 at
3 33–34; ECF No. 37-4 at 5–11. The Captains participate in the hiring and
4 promoting processes, but as appointed representatives of the union rather than as
5 representatives of MSA or the Hanford Fire Department. *See, e.g.*, ECF No. 39-17
6 at 10. Under the CBA, the Captains act “[a]s assigned by the [Battalion Chief].”
7 ECF No. 37-4 at 5. In short, the Captains do not have the authority to perform
8 many of the duties that the first responder regulation identifies as exempt duties.
9 69 Fed. Reg. at 22,130.

10 Other federal courts interpreting the first responder regulation’s application
11 to employees of similar rank to the Captains have concluded that their primary
12 duty is emergency response. In *Morrison*, the fire captain plaintiffs spent “only a
13 small portion of their time actually fighting fires,” meaning a significant portion of
14 their time was spent at the fire station. *Morrison*, 826 F.3d at 763. At the fire
15 station, the fire captains spent most of their time preparing for their first-response
16 duties, including daily emergency response training and physical fitness training.
17 *Id.* When not training, the fire captains created annual evaluations for the
18 firefighters in their crews, updated station policies to conform with county policies,
19 and accounted for supplies needed at the station. *Id.* at 764. The Captains did not
20 “set or control the budget, hire or fire employees, set minimum staffing levels,

1 change employees' work schedules, or approve overtime." *Id.* The Fourth Circuit
2 concluded "that the Captains' primary job duty is . . . emergency response." *Id.* at
3 769.

4 Similarly, in *Mullins*, the Second Circuit held that New York City police
5 sergeants were non-exempt first responders because of the first responder
6 regulation's impact on the primary duty test, even though the sergeants directed the
7 actions of others when responding to an emergency and wrote incident reports.
8 *Mullins v. City of N.Y.*, 653 F.3d 104, 121 (2d Cir. 2011). The Eastern District of
9 Tennessee found that a fire captain was non-exempt because his primary duty was
10 first response, despite his various managerial tasks that he completed at the fire
11 station in between emergencies. *Barrows*, 944 F. Supp. 2d at 605. The Central
12 District of California held that emergency medical services captains, of similar
13 rank to the Captains in this case, were non-exempt because most of the duties that
14 their employer claimed were managerial or administrative were done in
15 preparation for emergency response. *Carson v. City of L.A.*, No. CV 15-7057-JFW
16 (KLSx), 2016 WL 7647681, at *8 (C.D. Cal. Sept. 22, 2016). The majority of
17 federal courts surveyed that have analyzed the primary duty for similarly ranked
18 first responders since the first responder regulation's enactment have found that the
19 primary duty of the first responders is emergency response.

MSA argues that the above cases are irrelevant because of the Supreme Court's recent decision that FLSA exemptions should be given a "fair reading" rather than construed narrowly against the employer. *Encino Motorcars*, 138 S. Ct. at 1142; ECF No. 38 at 20 n.2. Several of the above cases did rely on the pre-*Encino Motorcars* doctrine of strictly construing the construction of FLSA exemptions against employers. *See, e.g., Morrison*, 826 F.3d at 768. Nonetheless, *Encino Motorcars* does not make the reasoning in the other cases any less persuasive. Further, the conclusion in this case results from a "fair reading" of the highly compensated employee exemption in combination with the first responder regulation. *See Encino Motorcars*, 138 S. Ct. at 1142. *Encino Motorcars* did not eliminate the guidance provided by several decades of FLSA precedent.

MSA argues that the managerial duties performed by the Captains are vital to the operation of the Hanford Fire Department, which automatically categorizes the managerial duties as the Captains' primary duty. ECF No. 38 at 18. The cases cited by MSA are inapposite to the current dispute. One case involved the interpretation of a group of regulations relevant to the administrative employee exemption, not the highly compensated exemption. *Bothell v. Phase Metrics, Inc.*, 299 F.3d 1120, 1125–26 (9th Cir. 2002). Another involved an analysis of the duties of a Chief of Police, who was "singularly responsible for managing and operating the department," which is a set of responsibilities that differs from the

1 Captains in this case. *Reed v. City of Asotin*, 917 F. Supp. 2d 1156, 1163 (E.D.
2 Wash. 2013). Two other cases involved employees who mainly managed the day-
3 to-day operations of their respective businesses, which, in this case, is a duty
4 assigned to the Battalion Chiefs, rather than the Captains. *Baldwin v. Trailer Inns,*
5 *Inc.*, 266 F.3d 1104, 1115 (9th Cir. 2001); *Kreiner v. Dolgencorp, Inc.*, 841 F.
6 Supp. 2d 897, 906 (D. Md. 2012). While the administrative work performed by the
7 Captains is surely beneficial to the Hanford Fire Department and MSA, the
8 Captains' emergency response work takes precedence, because they must respond
9 to emergencies when they are called. ECF No. 37-42 at 52; ECF No. 37-43 at 7.

10 MSA points to language in the 2013 Collective Bargaining Agreement
11 between MSA and its employees to prove that the Captains are exempt employees.
12 ECF No. 39 at 4. The CBA does state that the Captains are exempt employees.
13 ECF No. 39-3 at 8. However, "FLSA rights cannot be abridged by contract or
14 otherwise waived" and "congressionally granted FLSA rights take precedence over
15 conflicting provisions in a collectively bargained compensation arrangement."
16 *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 740–41 (1981). The CBA
17 does not render the FLSA's protections inoperative.

18 Ultimately, considering the primary duty factors, the first responder
19 regulation, the undisputed facts, and the character of their job as a whole, the
20 Captains' primary duty is emergency response. 29 C.F.R. § 541.700(a). To be

21 ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART
AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ~ 21

1 sure, the Captains perform a number of administrative and managerial duties.
2 Nonetheless, responding to an emergency takes priority over all of those duties.
3 Because the Captains' primary duty is emergency response, which does not
4 "include office or non-manual work," the Captains do not qualify for the highly
5 compensated employee exemption to the FLSA's overtime pay rule. Accordingly,
6 the Court finds that the Captains are not exempt from overtime pay, and summary
7 judgment on the issue of liability is granted for the Captains.

8 ***The Fluctuating Workweek Calculation of Damages***

9 The parties dispute whether damages should be calculated via the fluctuating
10 workweek method. ECF No. 36 at 38; ECF No. 38 at 23.

11 The fluctuating workweek is a method by which overtime pay is calculated
12 when the employee in question works "on a salary basis" and "may have hours of
13 work which fluctuate from week to week," but still receives "such fixed amount as
14 straight time pay for whatever hours he is called upon to work in a workweek,
15 whether few or many." 29 C.F.R. § 778.114(a). Instead of setting an hourly rate
16 of pay, from which the one and a half rate is calculated for overtime pay, the
17 fluctuating workweek sets a fixed weekly rate of pay. *Id.* If the employee works
18 more than forty hours in a given workweek, the fixed weekly pay is divided by the
19 number of hours worked to determine that specific week's hourly rate of pay. *Id.*

20 The employee is then compensated for all of the time worked that week at the

1 hourly rate and an additional half pay for every hour worked over forty hours in
2 that week. *Id.* The fluctuating workweek can only apply, however, if there is a
3 “clear mutual understanding of the parties that the fixed salary is compensation
4 (apart from overtime premiums) for the hours worked each workweek.” *Id.* This
5 method of calculation is almost always employer friendly. *Russell v. Wells Fargo*
6 *& Co.*, 672 F. Supp. 2d 1008, 1012 (N.D. Cal. 2009).

7 The Captains argue that the fluctuating workweek overtime calculation
8 method is inapplicable in failed exemption cases. ECF No. 36 at 38. There is
9 some support in the case law for this position. Those courts have reasoned that an
10 effective clear mutual understanding is absent in misclassification cases because
11 such understanding cannot exist unless overtime pay is being provided in the first
12 place. *See, e.g., Russell*, 672 F. Supp. 2d at 1014. Additionally, those courts
13 interpret section 778.114(c) to state that the fluctuating workweek calculation is
14 applicable only when overtime payments are made contemporaneously, precluding
15 the method from being applied in a failed exemption case. *See, e.g., id.* Other
16 district courts in the Ninth Circuit have followed *Russell*’s reasoning in denying
17 the use of the fluctuating workweek in misclassification cases. *Boyce v. Indep.*
18 *Brewers United Corp.*, 223 F. Supp. 3d 942, 946–48 (N.D. Cal. 2016); *McCoy v.*
19 *N. Slope Borough*, No. 3:13-CV-00064-SLG, 2013 WL 4510780, at *18–19 (D.
20 Alaska Aug. 26, 2013); *Zulewski v. Hershey Co.*, No. CV 11-05117-KAW, 2013

1 WL 633402, at *3–4 (N.D. Cal. Feb. 20, 2013); *Blotzer v. L-3 Commc’ns Corp.*,
2 No. CV-11-274-TUC-JGZ, 2012 WL 6086931, at *9–12 (D. Ariz. Dec. 6, 2012).
3 However, the Ninth Circuit has yet to address this issue. *Boyce*, 223 F. Supp. 3d at
4 945. The Captains argue that the Court should follow *Russell* and its progeny and
5 reject the use of the fluctuating workweek calculation method in this
6 misclassification case. ECF No. 36 at 38.

7 *Russell*’s first argument is that “an effective clear mutual understanding is
8 absent in misclassification cases” because there cannot be a clear mutual
9 understanding when the employees are not being paid overtime in the first place.
10 *Russell*, 672 F. Supp. 2d at 1014. However, this misstates the “clear mutual
11 understanding” requirement. Based on the text of 29 C.F.R. § 778.114, several
12 courts have ruled that the “clear mutual understanding” obligation does not require
13 that the employer show that the employees knew exactly how overtime pay was
14 calculated; rather, the employer only needs to show that, while hours worked in a
15 given workweek may change from week to week, the weekly pay will not change.
16 *Samson v. Apollo Res., Inc.*, 242 F.3d 629, 636–37 (5th Cir. 2001) (citing cases);
17 *Valerio v. Putnam Assocs. Inc.*, 173 F.3d 35, 40 (1st Cir. 1999) (holding that the
18 FLSA does not require a clear mutual understanding of “how [an employee’s]
19 overtime premiums should be calculated”).

1 There does not need to be an agreement that overtime will be calculated
2 using the fluctuating workweek method to meet the “clear mutual understanding”
3 requirement. Instead, the employer must show that there was a “clear mutual
4 understanding . . . that the fixed salary is compensation (apart from overtime
5 premiums) for the hours worked each workweek, whatever their number.” 29
6 C.F.R. § 778.114(a). Limiting the “clear mutual understanding” requirement to the
7 fixed salary rather than extending it to the method by which overtime is calculated
8 comports with the origin of the fluctuating workweek calculation. Initially, the
9 fluctuating workweek formula was created to determine an employee’s regular rate
10 of pay to calculate the correct overtime payment in accordance with section 207(a),
11 which states that an employee shall be paid “at a rate not less than one and one-half
12 times the regular rate” for overtime hours. *See Overnight Motor Transp. Co. v.*
13 *Missel*, 316 U.S. 572, 579–80 (1942) *superseded on other grounds by statute*,
14 Portal-to-Portal Act of 1947, 29 U.S.C. § 260, *as recognized in Trans World*
15 *Airlines, Inc. v. Thurston*, 469 U.S. 111, 128 n.22 (1985). Because the employee’s
16 salary does not change depending on the number of hours that the employee works
17 in a week, the employee’s regular rate of pay is the salary divided by the number of
18 hours worked, whatever those hours might be in the given week. *Id.* *Overnight*
19 *Motor* shows that the employees do not need to have a “clear mutual
20 understanding” that overtime pay will be calculated pursuant to the fluctuating

1 workweek; rather, the employees only need to have a “clear mutual understanding”
2 that their salary is fixed and will not change regardless of hours worked, and that
3 fixed rate will be used to determine the employees’ “regular rate of pay” under
4 section 207(a).

5 As explained in *Overnight Motor* and above, the clear mutual understanding
6 does not need to be how overtime is to be paid, but whether the employee is paid
7 on a fixed weekly rate regardless of hours worked, because the clear mutual
8 understanding applies to determining the employee’s “regular rate of pay” to be
9 used in calculating overtime pay under section 207(a). *Overnight Motor*, 316 U.S.
10 at 579–80. The text of section 778.114 supports this interpretation of the clear
11 mutual understanding requirement: “Where there is a clear mutual understanding
12 of the parties that the fixed salary is compensation (apart from overtime premiums)
13 for the hours worked each workweek, whatever their number, . . . such a salary
14 arrangement is permitted by the Act . . . if he receives extra compensation, in
15 addition to such salary, for all overtime hours worked at a rate not less than one-
16 half his regular rate of pay.” 29 C.F.R. § 778.114(a). The structure of the sentence
17 indicates that the “clear mutual understanding” applies to a fixed salary for the
18 hours worked, but does not apply to the extra compensation clause because the two
19 clauses are separated by the phrase: “such a salary arrangement is permitted by the
20

1 Act.” *Id.* Therefore, the Court respectfully disagrees with *Russell*’s first argument
2 against retroactive application of the fluctuating workweek calculation.

3 *Russell*’s second argument is that section 778.114 requires a
4 contemporaneous payment of overtime benefits for the fluctuating workweek
5 calculation to apply, foreclosing the method’s use in misclassification cases.
6 *Russell*, 672 F. Supp. 2d at 1014. This argument comes from the last sentence in
7 section 778.114(c): “On the other hand, where all the facts indicate that an
8 employee is being paid for his overtime hours at a rate no greater than that which
9 he receives for nonovertime hours, compliance with the Act cannot be rested on
10 any application of the fluctuating workweek overtime formula.” 29 C.F.R. §
11 778.114(c); *Russell*, 672 F. Supp. 2d at 1012. The Court does not interpret this
12 sentence to require contemporaneous overtime payment for the fluctuating
13 workweek to apply. This sentence states that an employer, having been accused of
14 not following section 207(a)’s overtime pay rule, cannot argue that the fixed
15 weekly rate incorporates both regular pay and overtime pay while still complying
16 with section 206’s minimum wage requirements. Essentially, an employer cannot
17 say that because the fixed weekly rate could be calculated to meet the minimum
18 wage and overtime pay requirements, the employer should not be liable. It does
19 not require, as the Captains argue and *Russell* and other courts state, that overtime
20

1 payments must be made contemporaneously for the fluctuating workweek formula
2 to apply.

3 *Russell* also cites to a passage from *Overnight Motor* to support its
4 interpretation of the last sentence of section 778.114(c) to require
5 contemporaneous payment of overtime, but that passage does not support *Russell*'s
6 interpretation, and instead supports the Court's interpretation above. The employer
7 in *Overnight Motor* argued that it complied with the FLSA because the amount it
8 paid its employees was "sufficiently large to cover both base pay and fifty per cent
9 additional for the hours worked over the statutory maximum without violating
10 [minimum wage requirements]." *Overnight Motor*, 316 U.S. at 581. But the
11 Supreme Court rejected that argument, holding that "[i]mplication cannot mend a
12 contract so deficient in complying with the law." *Id.* This supports the Court's
13 interpretation of the last sentence of section 778.114(c): it prevents employers from
14 arguing technical compliance with the FLSA after being accused of violations,
15 rather than requiring contemporaneous payment of overtime for the fluctuating
16 workweek calculation method to apply.

17 Ultimately, the Court rejects the Captains' arguments and finds that the
18 fluctuating workweek can be used to calculate overtime in a misclassification case.
19 This finding is supported by the original understanding of the fluctuating
20 workweek and the DOL's guiding principles. Additionally, while not binding on

1 this Court, several Courts of Appeals that have considered this issue have come to
2 this same conclusion. *See Black v. SettlePou, P.C.*, 732 F.3d 492, 497–98 (5th Cir.
3 2013); *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1311 (11th Cir.
4 2013); *Urnikis-Negro v. Am. Family Prop. Servs.*, 616 F.3d 665, 678–79 (7th Cir.
5 2010)¹; *Clements v. Serco, Inc.*, 530 F.3d 1224, 1230 (10th Cir. 2008); *Valerio*,
6 173 F.3d at 40; *Roy v. Cty. of Lexington, S.C.*, 141 F.3d 533, 547 (4th Cir. 1998).

7 The Captains argue that there was no clear mutual understanding that their
8 salary was intended to cover their hours worked because of the difference of
9

10 ¹ *Urnikis-Negro* is unique in that it rejects any application of section 778.114 to
11 calculating damages in any FLSA case because the Seventh Circuit found that the
12 rule is “forward looking.” 616 F.3d at 677. Further, it agrees with the arguments
13 that the Captains make here, which is that section 778.114 requires a clear mutual
14 understanding of both the fixed weekly nature of the compensation and how
15 overtime premiums will be paid, as well as the contemporaneous payment of
16 overtime premiums. *Id.* at 677–79. However, the Seventh Circuit still held that
17 the fluctuating workweek calculation is appropriate in misclassification cases
18 because of *Overnight Motor* (which the Seventh Circuit refers to as *Missel*):
19 “Urnikis-Negro, like Missel, was paid a fixed weekly sum for any and all hours
20 that she worked. Like Missel, she routinely worked substantial amounts of
overtime. And like Missel, she never received any premium for the overtime hours
she worked. The Supreme Court held that in this situation, the employee’s regular
rate of pay for a given week is calculated by dividing the fixed weekly wage by the
total number of hours worked in that week.” *Id.* at 681. If the Seventh Circuit’s
reasoning in *Urnikis-Negro* were applied in the present case, the Court finds that
the fluctuating workweek method would still be the appropriate calculation
method.

1 compensation between scheduled and unscheduled overtime. ECF No. 51 at 11–
2 13. Under the CBA between the Captains and MSA, the Captains were paid a
3 fixed weekly rate of pay for all scheduled hours worked, including scheduled
4 overtime hours (that is, those hours worked in excess of forty hours that the
5 Captains knew that they would work) and an additional “straight time” pay for all
6 unscheduled overtime hours (that is, those hours worked in excess of forty hours
7 that were not scheduled, but the Captains worked anyway, because they covered a
8 shift for someone else). ECF No. 39-3 at 22–23. Because the Captains’ salary
9 does not cover all hours that the Captains worked (i.e., the unscheduled overtime
10 hours), the Captains argue that there is no clear understanding that the salary was
11 intended to cover all hours worked. ECF No. 51 at 11–13.

12 The text of section 778.114 guides the Court once again. The text reads that
13 “[w]here there is a clear mutual understanding of the parties that the fixed salary is
14 compensation (apart from overtime premiums) for the hours worked each
15 workweek . . .” 29 C.F.R. § 778.114(a). The amount that the Captains were paid
16 for unscheduled overtime hours, the additional straight time pay, is an overtime
17 premium because it is extra compensation given for work outside of the Captains’
18 regular schedules. *See* ECF No. 39-3 at 23 (defining the Captains’ additional
19 straight time rate as “Overtime Pay for Work Outside Normal Schedule of Hours”).
20 Overtime premiums are “[c]ertain premium payments made by employers for work

1 in excess of or outside of specified daily or weekly standard work periods or on
2 certain special days.” 29 C.F.R. § 778.201(a). As this definition shows, the
3 additional straight time pay that the Captains received working unscheduled
4 overtime is an “overtime premium” within the meaning of section 778.114(a), and
5 overtime premiums are excluded from the “fixed salary” analysis. 29 C.F.R. §
6 778.114(a).

7 As far as the Captains’ salary is concerned, there was a clear mutual
8 understanding that the salary covered the Captains’ regular work schedules,
9 regardless of whether the Captains worked 48 hours or 72 hours in a given
10 workweek, and that they would receive an overtime premium for hours worked in
11 excess of those scheduled. ECF No. 39-3 at 21 (defining the Captains’ schedule of
12 hours to include 72-hour workweeks and 48-hour workweeks); 23 (overtime
13 premium description). While it is true that the Captains were not being paid FLSA
14 overtime, section 778.114 simply states “overtime premium,” not “FLSA
15 overtime.” 29 C.F.R. § 778.114(a); *see also* 29 C.F.R. § 778.201(a) (defining
16 overtime premiums). Therefore, the Captains’ arguments are unpersuasive.

17 It is undisputed in this case that the Captains received a fixed weekly salary
18 for their scheduled hours worked, whether those scheduled hours were 48 or 72, in
19 a given workweek. ECF No. 51 at 11; ECF No. 55 at 15. This means that there
20 was a “clear mutual understanding” that the Captains would receive the same

1 weekly salary regardless of the number of scheduled hours that the Captains would
2 work in a given workweek. *See* 29 C.F.R. § 778.114(a). Accordingly, the
3 fluctuating workweek is the correct method by which the Captains’ “regular rate of
4 pay” will be determined in order to calculate the amount of overtime pay that the
5 Captains are owed.

6 Considering the findings above, the Court holds that the Captains are due
7 overtime payments via the fluctuating workweek method.²

8 ***Liquidated Damages***

9 The parties dispute whether liquidated damages are appropriate. ECF No.
10 36 at 39; ECF No. 38 at 29.

11 An employer that violates the FLSA’s overtime pay rule “shall be liable to
12 the employee or employees affected in the amount of their . . . unpaid overtime
13 compensation . . . and in an additional equal amount as liquidated damages.” 29
14 U.S.C. § 216(b). But “if the employer shows to the satisfaction of the court that
15 the act or omission giving rise to [FLSA liability] was in good faith and that he had
16 reasonable grounds for believing that his act or omission was not a violation of the
17 Fair Labor Standards Act of 1938, . . . the court may, in its sound discretion, award

18
19
20 ² Given the Court’s finding here, the Court declines to analyze MSA’s section 259
argument regarding the fluctuating workweek. ECF No. 40 at 32.

1 no liquidated damages.” 29 U.S.C. § 260. The determination of the employer’s
2 good faith and reasonable grounds for its actions is a mixed question of law and
3 fact and should be determined with objective tests. 29 C.F.R. § 790.22(c).
4 Notwithstanding the regulation, the Ninth Circuit evaluates the question of
5 liquidated damages with a subjective good faith test and an objective reasonable
6 grounds test. *See Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 920 (9th Cir.
7 2003).

8 Under the FLSA, “[d]ouble damages are the norm, single damages the
9 exception.” *Local 246 Util. Workers Union v. S. Cal. Edison Co.*, 83 F.3d 292,
10 297 (9th Cir. 1996). Liquidated damages are compensation and are not punitive.
11 *Id.* The employer holds the “difficult” burden in proving that it acted in good faith
12 and a reasonable belief that it was not violating the FLSA. *Alvarez v. IBP, Inc.*,
13 339 F.3d 894, 910 (9th Cir. 2003). The employer must “show that it actively
14 endeavored to ensure” FLSA compliance. *Id.* Mere “bald assertions” that the
15 employer thought it was following the FLSA does not show a good faith effort to
16 comply with the FLSA. *Equal Emp’t Opportunity Comm’n v. First Citizens Bank*
17 *of Billings*, 758 F.2d 397, 403 (9th Cir. 1985). Additionally, post hoc
18 rationalizations for the mistaken exemption are not evidence of good faith or
19 reasonable belief. *Alvarez*, 339 F.3d at 910.

MSA points to “a singularly robust mountain of evidence” to prove its burden that MSA acted with good faith and a reasonable belief that the Captains were truly exempt from the FLSA’s overtime rule. ECF No. 38 at 30. The first piece of evidence that they point to is the *Porter* case. *Id.* at 31. In *Porter*, the Ninth Circuit held that firemen employed in the Richland and North Richland area by General Electric were entitled to overtime pay on the fluctuating workweek calculation. *Gen. Elec. Co. v. Porter*, 208 F.2d 805, 813 (9th Cir. 1953). MSA argues that *Porter* justifies their classification because the predecessor employees to the Captains did not join the *Porter* lawsuit, showing that the exemption was made in good faith and that the conclusion does not change “now that the Platoon Captains changed their minds.” ECF No. 38 at 31. MSA also argues that its preceding contractors all classified the Captains as exempt workers for the previous nearly-seventy years. *Id.*

The contention that MSA could rely on a nearly seventy-year-old case that did not involve employees equivalent to today’s Captains, let alone today’s Captains who are the plaintiffs to this lawsuit, is unpersuasive. First, *Porter* is not relevant to the current dispute because that case involved different employees (firemen) and a different argument about qualifying for overtime pay (whether the firemen were “in an occupation ‘closely related’ and ‘directly essential’ to the product of goods for commerce”). *Porter*, 208 F.3d at 809–10. *Porter* did not

1 answer the principal question addressed in this case, which is whether the
2 predecessors of the current Captains were exempt as highly compensated
3 employees.

4 MSA acknowledges these differences but contends that *Porter* is still
5 relevant as evidence of good faith and reasonable belief because “the predecessor
6 employees to the Platoon Captains did not join the *Porter* lawsuit.” ECF No. 38 at
7 31. MSA continues: “The *Porter* case alone undergirds the idea that the Captains
8 were objectively exempt, since they did not join the other plaintiffs in the *Porter*
9 class action suit, and the employer should not be disabled from asserting a good
10 faith exemption now that the Platoon Captains changed their minds.” *Id.* MSA’s
11 argument that the present Plaintiffs are bound by the decisions of their nearly
12 seventy-year-old predecessors in the job is not persuasive. MSA’s argument also
13 implies that the onus of FLSA compliance falls on the employees and what they
14 are willing to accept, not the employer and what the employer owes, which does
15 not comport with FLSA case law. *See Alvarez*, 339 F.3d at 910 (holding that an
16 employer must show that it “actively endeavored to ensure” FLSA compliance to
17 meet the good faith and objective reasonableness prongs of section 260).

18 The Court also rejects MSA’s argument that its predecessor contractors
19 classified the Captains as exempt. While MSA may have been relying on what had
20 become standard practice, its reliance on that practice amounts to little more than a

1 bald assertion that it thought it was following the FLSA, which is not enough to
2 meet MSA's burden under section 260. *See First Citizens Bank*, 758 F.2d at 403.
3 Further, the first responder regulation was enacted in 2004, which clarified the
4 FLSA's application to certain emergency personnel. 29 C.F.R. § 541.3(b). While
5 MSA did not take over the Hanford contract until 2009, the Court finds that
6 reliance on a decades-old case when the law had since been updated is not
7 evidence of good faith or reasonable grounds. ECF No. 39 at 23.

8 MSA also states that their exempt classification of the Captains was
9 supported by an opinion written by a regional office of the National Labor
10 Relations Board. ECF No. 38 at 32. The opinion, issued in 1990, addressed
11 whether the Captains and Lieutenants of the Hanford Fire Department could form a
12 collective bargaining unit under section 9 of the National Labor Relations Act.
13 ECF No. 39-9; *see also* 29 U.S.C. § 159(c). The Regional Director found that the
14 Captains and Lieutenants could not form a collective bargaining unit under the
15 NLRA because they were supervisory employees. ECF No. 39-9 at 8–9.

16 The Court finds unpersuasive that an NLRB Regional Director's decision
17 supports MSA's good faith in concluding that the Captains are exempt from
18 overtime pay under the FLSA. The eight-page opinion never mentions the FLSA
19 and does not opine on the Captains' qualification for overtime pay. ECF No. 39-9.
20 MSA argues that, following this NLRB decision, the Captains unionized as

21 ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART
AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY
JUDGMENT ~ 36

1 “exempt” employees. ECF No. 38 at 32. However, at the time, the Captains were
2 classified as exempt by MSA, which arguably would disqualify them as being able
3 to unionize under the NLRA. Further, this repeats an argument that MSA made in
4 relation to the *Porter* case, which is that the current Captains should be bound by
5 the decision of their predecessors not to pursue overtime pay and is an argument
6 that continues to be unpersuasive. The opinion by the NLRB Regional Director
7 regarding the Captains’ eligibility for unionization involves different issues,
8 different people, different law, and happened at a different time.

9 MSA also relies on a history of agreements between the Captains and their
10 employers that the Captains were exempt from overtime pay as evidence of their
11 good faith and reasonable grounds. ECF No. 38 at 32. These agreements include a
12 2001 letter between the union and Fluor, a preceding contractor; the 2007 CBA
13 with Fluor; and the 2013 CBA with MSA; all of which stated the mutual
14 understanding between the employer and the Captains that the Captains were
15 exempt from overtime pay. *Id.* at 32–34.

16 MSA’s argument that the Captains essentially agreed to being exempt is
17 irrelevant considering that “FLSA rights cannot be abridged by contract or
18 otherwise waived” and “congressionally granted FLSA rights take precedence over
19 conflicting provisions in a collectively bargained compensation arrangement.”

20 *Barrentine* , 450 U.S. at 740–41. Admittedly, *Barrentine* and its progeny discuss

1 liability under the FLSA, whereas here the issue is whether MSA acted with good
2 faith and a reasonable ground to believe that it followed the FLSA in determining
3 whether liquidated damages should be applied. *Id.* However, allowing
4 employment agreements to show evidence of good faith and reasonable grounds
5 would incentivize employers to get employees to illegally waive their FLSA rights
6 in CBAs or other employment agreements because it would chill any potential
7 FLSA enforcement by the employees, and, if some employees overcame the
8 chilling presence of the agreement, would save the employer from the application
9 of liquidated damages. An interpretation of the FLSA that would invite employers
10 to chill FLSA enforcement and secure protection from liquidated damages with
11 illegal activity would not comport with the purposes of the FLSA. *See Overnight*
12 *Motor*, 316 U.S. at 578.

13 MSA cited some cases that found reliance on a negotiated CBA was
14 evidence of good faith and reasonable grounds and was enough to meet the
15 employer's burden under section 260, but these cases are not persuasive. ECF No.
16 38 at 37. In one case, the Third Circuit held that the employer was not put on
17 notice that it was potentially violating the FLSA, which is a different standard than
18 what is employed in the Ninth Circuit regarding the application of liquidated
19 damages. *Brooks v. Vill. of Ridgefield Park*, 185 F.3d 130, 138 (3d Cir. 1999); *but*

1 *see Alvarez v. IBP, Inc.*, 339 F.3d 894, 910 (9th Cir. 2003) (holding that an
2 employer must “actively endeavor” to ensure FLSA compliance).

3 In another case, the District Court in Massachusetts also relied on a “notice”
4 requirement and also stated that “[d]ouble damages are designed in part to
5 compensate for concealed violations, which may escape scrutiny.” *Rudy v. City of*
6 *Lowell*, 777 F. Supp. 2d 255, 263 (D. Mass. 2011) (citing *Walton v. United*
7 *Consumers Club, Inc.*, 786 F.2d 303, 312 (7th Cir. 1986)). There is no evidence
8 that this was the intention of the FLSA’s liquidated damages clause and the
9 Seventh Circuit case that the *Rudy* court relied on does not cite the statute when it
10 makes the quoted assertion. The *Rudy* court’s assertion that liquidated damages
11 was intended to apply to “concealed violations” instead implies that liquidated
12 damages are intended to be punitive, an assertion that is also repeated throughout
13 MSA’s briefing. That assertion is incorrect. “We have previously held that the
14 liquidated damage provision is not penal in its nature but constitutes compensation
15 for the retention of a workman’s pay which might result in damages too obscure
16 and difficult of proof for estimate other than by liquidated damages.” *Brooklyn*
17 *Sav. Bank v. O’Neil*, 324 U.S. 697, 707 (1945) (citing *Overnight Motor*, 324 U.S.
18 at 707).

19 Finally, in the third case, the Fifth Circuit held in 1953 that the employer’s
20 reliance on statements made by an expert employed by the union during the

1 negotiation of the CBA supported that the employer met its burden under section
2 260 of being reasonable and based on good faith. *Foremost Dairies, Inc. v. Ivey*,
3 204 F.2d 186, 190 (5th Cir. 1953). Here, MSA argues that the CBA itself is
4 evidence of good faith and reasonable belief. Therefore, the third case does not
5 support MSA's position. The Court concludes that the letter with Fluor and the
6 2007 and 2013 CBAs do not support MSA's position that it acted in good faith or
7 on reasonable grounds when it did not pay the Captains overtime pay.

8 MSA also cites to a letter written by legal counsel to Fluor finding that the
9 Captains were exempt from overtime pay as evidence of their good faith and
10 reasonable grounds. ECF No. 38 at 34. In this 1999 letter, the author states that
11 the Captains are exempt from overtime pay under the FLSA because "their primary
12 duty consists of the management of a customarily recognized subdivision of the
13 fire department, and they regularly direct the work of two or more other
14 employees." ECF No. 39-11 at 13. While this letter is more relevant to supporting
15 MSA's good faith and reasonable grounds argument, it is not enough to meet
16 MSA's burden under section 260, because this letter is now twenty years old and
17 does not take into account changes in the law since then, such as the first responder
18 regulation enacted in 2004 of which MSA should have been aware.

19 Finally, MSA argues that the first responder regulation did not trigger a
20 requirement to re-evaluate the Captains' status as exempt employees because the

1 DOL stated that it had “no intention of departing from . . . established case law.”
2 ECF No. 38 at 35 (quoting 69 Fed. Reg. at 22129). The ellipses inserted by MSA
3 into this quotation skips over an important word: “The Department has no intention
4 of departing from *this* established case law.” 69 Fed. Reg. at 22129 (emphasis
5 added). The “this” that MSA omitted refers to the prior two paragraphs of the
6 DOL’s preamble, which collected cases from federal courts across the country
7 holding that first responders, such as firefighters, are not exempt from the FLSA’s
8 overtime pay rule as executive, administrative, or professional employees, even if
9 they direct the work of other first responders. *Id.* MSA is correct that the first
10 responder regulation was not intended to change established case law, but the
11 established case law at the time held that firefighters with similar responsibilities to
12 the Captains in this case were not exempt from overtime pay. *Id.* While MSA did
13 not enter into the contract until 2009, the preamble undercuts MSA’s reliance on
14 the actions of its predecessors.

15 MSA also presents an email between an attorney, Alex Skalbania, and one of
16 the plaintiffs in this case, Chad Riley, as proof that it meets its burden under section
17 260. ECF No. 38 at 36. In this email, Mr. Skalbania states that “there are court
18 cases going both ways on the question of whether Fire Captains are exempt or not
19 when it comes to FLSA [overtime].” ECF No. 39-12 at 2. According to MSA, this
20 email shows that it should not be “punished” with liquidated damages because even

1 the Captains agree that their overtime pay classification is a close question. ECF
2 No. 38 at 36. However, even if the Captains had agreed it was a close question, that
3 is not dispositive as to whether MSA acted in good faith, and there is no evidence
4 that MSA relied on this email prior to the beginning of this lawsuit. Post hoc
5 explanations by an employer do not meet the burden to overcome the application of
6 liquidated damages. *See Alvarez*, 339 F.3d at 910. Additionally, this is far from the
7 example provided in *Foremost Dairies*, in which “an expert employed by the Union
8 stated his opinion that there was no [FLSA] coverage and that the opinion was
9 shared by defendant’s lawyer and by a lawyer representing another dairy company.”
10 *Foremost Dairies*, 204 F.2d at 190.

11 The imposition of liquidated damages is not intended to be punitive;
12 liquidated damages is only intended to compensate the misclassified employees for
13 losses too difficult and obscure to otherwise prove. *Brooklyn Sav. Bank*, 324 U.S. at
14 707. Several of MSA’s arguments involve an attempt to convince the Court not to
15 punish it for what it claims to be reasonable behavior, but the Court is not persuaded.
16 The Court finds that MSA’s proposed evidence of good faith or reasonable grounds
17 for belief that it followed the FLSA regarding the Captains is not persuasive and
18 does not meet MSA’s burden under section 260. Therefore, the Court imposes
19 liquidated damages. 29 U.S.C. § 216(b) (“Any employer who violates the
20 provisions of . . . section 207 of this title shall be liable . . . in the amount of . . . their

21 ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS’
MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART
AND DENYING IN PART DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT ~ 42

1 unpaid overtime compensation . . . and in an additional equal amount as liquidated
2 damages).

3 *Statute of Limitations*

4 The parties dispute whether the statute of limitations in this case should be
5 two or three years. ECF No. 36 at 45; ECF No. 38 at 38.

6 The statute of limitations for any violation of the FLSA is two years after the
7 cause of action accrued, except that “a cause of action arising out of a willful
8 violation may be commenced within three years after the cause of action accrued.”

9 29 U.S.C. § 255(a). An employer acts willfully within the meaning of section

10 255(a) when “the employer either knew or showed reckless disregard for the

11 matter of whether its conduct was prohibited by the statute.” *McLaughlin v.*

12 *Richland Shoe Co.*, 486 U.S. 128, 133 (1988). An employer that acts

13 “unreasonably, but not recklessly” in determining its compliance with the FLSA

14 does not act willfully. *Id.* at 135 n.13. The determination of willfulness is a mixed

15 question of law and fact. *Alvarez*, 339 F.3d at 908. The burden of proving

16 willfulness is on the plaintiff. *Chao v. Westside Drywall, Inc.*, 709 F. Supp. 2d

17 1037, 1059 (D. Or. 2010).

18 The Captains argue that MSA acted willfully in its FLSA violations because

19 of a meeting between representatives of the Captains and MSA. ECF No. 36 at 45.

20 At this meeting, the representative of the Captains stated that MSA should “[d]o an

21 ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS’
MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART
AND DENYING IN PART DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT ~ 43

1 FLSA audit on captains to determine accurate classification. If deemed exempt,
2 look into wages to balance lieutenant and captain.” ECF No. 37-18 at 6. Despite
3 being made aware of the Captains’ desire to investigate their qualification for
4 overtime pay, the Captains claim that MSA did not reevaluate their exempt status.
5 ECF No. 36 at 45.

6 However, the undisputed facts show that MSA was ready to conduct this
7 audit. An email was sent to Kevin Miller, a Plaintiff to this lawsuit, requesting a
8 meeting regarding his request for an audit for “Fair Labor Standards Act related stuff
9 ([overtime] calculations)” so that MSA could “fully understand the scope of the
10 audit you would like performed.” ECF No. 39-13 at 2. In response to this email,
11 Mr. Miller replied that he no longer was interested in the audit. *Id.*

12 This request for an audit, and MSA’s supposed inaction following the audit, is
13 the Captains’ sole piece of evidence in favor of its willfulness argument. *See* ECF
14 No. 36 at 45; ECF No. 42 at 44; ECF No. 51 at 24. With this single piece of
15 evidence, the Captains chiefly rely on an isolated statement in *Alvarez*, stating that
16 MSA “took no affirmative action to assure compliance with [the FLSA].” ECF No.
17 36 at 45; *Alvarez*, 339 F.3d at 909. However, *Alvarez* also says that a court should
18 not “presume that conduct was willful in the absence of evidence.” *Id.* Here, while
19 the Court rejects MSA’s arguments as to liquidated damages, the undisputed facts do
20 not support that MSA acted willfully or in reckless disregard of the FLSA’s

21 ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS’
MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART
AND DENYING IN PART DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT ~ 44

1 requirements. The Captains did not meet their burden with this one piece of
2 evidence and single line from a single Ninth Circuit case. Therefore, the Court finds
3 that the appropriate statute of limitations is two years.

4 *Calculation of the Captains' Regular Rate and Credit to Overtime Pay*

5 The parties dispute what payments are included in the Captains' regular rate
6 of pay and whether the Captains' wages received for the overtime periods worked
7 should be credited against any award to the Captains for MSA's liability under the
8 FLSA. ECF No. 38 at 42; ECF No. 42 at 33.

9 As has been previously discussed, overtime pay is calculated by paying an
10 employee one and one-half times "the regular rate at which he is employed." 29
11 U.S.C. § 207(a)(1). An employee's "regular rate" includes "all remuneration for
12 employment paid to, or on behalf of, the employee," but does not include several
13 types of excepted payments defined in subsections 207(e)(1)–(8). 29 U.S.C. §
14 207(e). Subsection five states that "extra compensation provided by a premium
15 rate paid for certain hours worked by the employee in any day or workweek
16 because such hours are worked . . . in excess of the employee's normal working
17 hours or regular working hours" is not included in an employee's regular rate. 29
18 U.S.C. § 207(e)(5). Regulations provide further guidance, stating that "where the
19 employee's normal or regular daily or weekly working hours are greater or less
20 than 8 hours or 40 hours respectively and his contract provides for the payment of

1 premium rates for work in excess of such normal or regular hours of work for the
2 day or week . . . the extra compensation provided by such premium rates, paid for
3 excessive hours, is a true overtime premium to be excluded from the regular rate.”
4 29 C.F.R. § 778.202(b).

5 Here, it is undisputed that when the Captains would work beyond their
6 normal scheduled hours, whether those were 48 or 72 in a given workweek, the
7 Captains were paid an additional straight time rate. ECF No. 39-3 at 23; ECF No.
8 39-32 at 4 (“[I]n every instance that Plaintiff as a Platoon Captain has worked
9 unscheduled overtime hours above the 40-hour FLSA threshold, Defendant has
10 paid Plaintiff as a straight time rate instead of at time and one half his regular rate
11 of pay.”). The additional straight time rate is a payment for work “in excess of
12 such normal or regular hours of work for the day or week.” 29 C.F.R. §
13 778.202(b). This means the additional straight time rate, paid for unscheduled
14 overtime hours, is excluded from the calculation of the Captains’ regular rate of
15 pay under section 207(e)(5). 29 U.S.C. § 207(e)(5). The additional straight time
16 rate also counts as a credit against the overtime compensation that the Captains are
17 due, because “[e]xtra compensation paid as described in paragraphs (5), (6), and
18 (7) of subsection (e) shall be creditable toward overtime compensation payable
19 pursuant to this section.” 29 U.S.C. § 207(h)(2).

1 The Captains argue that sections 207(e) and (h) are inapplicable to the
2 premium that they received in working unscheduled overtime hours because, in
3 their view, the fluctuating workweek calculation formula does not apply and
4 therefore there is no credit that needs to be made. ECF No. 42 at 33. Essentially,
5 the Captains tied together their arguments against the fluctuating workweek, the
6 calculation of the Captains' regular rate, and the credit against any overtime pay
7 due. *Id.*

8 The Court already rejected the Captains' arguments as to the fluctuating
9 workweek, and similarly rejects their arguments against removing the overtime
10 premium from their regular rate and crediting it toward the pay owed to the
11 Captains. The additional straight time rate is an extra payment provided to the
12 Captains "in excess of the employee's normal working hours or regular working
13 hours," that being the 48 or 72 hours that the Captains are expected to work in a
14 given week. 29 U.S.C. § 207(e)(5). Because the additional straight time rate fits
15 an exception under section 207(e), the rate is excluded from the Captains' regular
16 rate. *Id.* And when subsection 207(e)(5) applies, that extra compensation "shall be
17 creditable toward overtime compensation payable pursuant to this section." 29
18 U.S.C. § 207(h)(2).

19 Accordingly, the Court finds that the additional straight time rate that the
20 Captains would receive for unscheduled overtime hours, in excess of the 48 or 72

1 worked in a given workweek, is not included in the calculation of the Captains'
2 regular rate. Additionally, the Court finds that the additional straight time rate paid
3 during the applicable statute of limitations period for unscheduled overtime hours
4 is creditable against the damages owed to the Captains.

5 ***The Applicability of Section 207(k)***

6 The Captains move for summary judgment on MSA's request to apply a
7 special schedule described in 29 U.S.C. § 207(k). ECF No. 36 at 16 n.2. MSA
8 argues that the facts are in dispute regarding the applicability of section 207(k).
9 ECF No. 40 at 43.

10 Section 207(k) states that public agencies can comply with the FLSA's
11 overtime rule as it relates to "any employee in fire protective activities" if they
12 follow a special schedule. 29 U.S.C. § 207(k). But the application of section
13 207(k) "is limited to public agencies," and the section "does not apply to any
14 private organization engaged in furnishing fire protection . . . This is so even if the
15 services are provided under contract with a public agency." 29 C.F.R. § 553.202.
16 If section 207(k) is applicable, then the municipality bears the burden of proving
17 that it established a section 207(k) work period and that the work period was
18 regularly recurring, which is a question of fact. *Adair v. City of Kirkland*, 185 F.3d
19 1055, 1060 (9th Cir. 1999).

1 MSA argues that section 207(k)'s applicability is a question of fact due to
2 MSA's performance of "uniquely federal functions" and because MSA's contract
3 with the federal government "involves work like no other 'private' fire department
4 FLSA case." ECF No. 40 at 44. However, while an employer's compliance with
5 section 207(k) is a question of fact, an employer's status as a public agency is not.
6 *See Conway v. Takoma Park Volunteer Fire Dep't, Inc.*, 666 F. Supp. 786, 792 (D.
7 Md. 1987) (deciding whether the employer was a "public agency" as a matter of
8 law to determine the applicability of section 207(k)). Here, the law states that
9 private organizations that provide fire protection services cannot avail themselves
10 of a 207(k) schedule, "even if the services are provided under contract with a
11 public agency." 29 C.F.R. § 553.202. MSA has not argued that it is a public
12 agency within the meaning of the FLSA. *See* 29 U.S.C. § 203(x) (defining public
13 agency). Therefore, MSA cannot utilize the special schedule of section 207(k)
14 because it is not a public agency.

15 Additionally, MSA argues that it can avail itself of the provisions of Title V
16 of the United States Code and its companion regulations relating to overtime pay
17 for federal firefighters because MSA, "as a federal management contractor,
18 performing uniquely federal functions, at a federal nuclear facility, . . . can avail
19 itself of the federal OPM regulatory exemption." ECF No. 40 at 45. Once again,
20 MSA's argument is foreclosed by the plain text of the statute. The provisions and

1 regulations of Title V that MSA wants to invoke are applicable only to
2 “employees” as defined in Title V, who are “individual[s] employed in or under an
3 agency.” 5 U.S.C. §§ 5102(a)(2); 5542(a). Agency means an executive agency,
4 the Library of Congress, the Botanic Garden, the Government Publishing Office,
5 the Office of the Architect of the Capitol, and the government of the District of
6 Columbia. 5 U.S.C. § 5102(a)(1). MSA, plainly, is none of these things because it
7 is a private organization, specifically, a limited liability company organized under
8 the laws of Delaware. ECF No. 37-37 at 4. Therefore, MSA cannot avail itself of
9 Title V of the United States Code or its companion regulations.

10 *Sleep Time and Mealtime*

11 The Captains argue that summary judgment is appropriate on MSA’s
12 affirmative defense as to sleep and mealtime because there is no evidence of an
13 agreement to exclude sleep and mealtime from the Captains’ hours worked. ECF
14 No. 36 at 39 n.8. MSA argues that there is a dispute of fact as to both sleep and
15 mealtime because of a declaration from Fire Chief Norbert Kuhman. ECF No. 40
16 at 45–47; ECF No. 40-5.

17 For an employee that is required to be on duty for 24 hours or more, eight
18 hours of sleep time and meal periods constitute hours worked. 29 C.F.R. §
19 785.22(a). An employer and an employee can agree to exclude meal periods and
20 sleep time from hours worked by express or implied agreement. *Id.*

1 Three separate witnesses agreed that there is no agreement between the
2 Captains and MSA that sleep or meal periods are excluded from the hours worked
3 in a workweek. The first was Chief Kuhman, who stated “There’s no unpaid time
4 for meals or sleeping.” ECF No. 37-38 at 51. The second was Mary Murphy, the
5 Director of Employee and Labor Relations for MSA, who stated “I do know that
6 [the Captains] get paid for the full 24-hour shift. So I would assume they are being
7 paid for their sleep time.” ECF No. 37-39 at 16. The third is Aaron Raddock, an
8 expert retained by MSA, who stated that, based on his knowledge, there was no
9 agreement to exclude sleep time from the Captains’ hours worked in a work week.
10 ECF No. 37-40 at 8.

11 The only evidence that MSA provides in support of a potential express or
12 implied agreement to exclude sleep and meal periods from a calculation of the
13 Captains’ hours worked is a declaration by Chief Kuhman submitted along with
14 MSA’s reply to the Captains’ Motion for Summary Judgment. ECF No. 40-5. In
15 that declaration, Chief Kuhman states that the CBA between MSA and the
16 Captains does “not provide any extra compensation for meals whether regular time
17 or overtime.” ECF No. 40-5 at 3. He then states that the “2013 CBA set a Fixed
18 Weekly Rate for the entire work week including any meal time. It did not provide
19 for any extra compensation for meal periods.” *Id.* at 4. Additionally, he states that
20 “the 2013 CBA set a Fixed Weekly Rate for the entire work week including any

1 sleep time. It did not provide for any extra compensation for sleeping on the job.”

2 *Id.*

3 Contrary to MSA’s assertions, Chief Kuhman’s declaration does not dispute
4 the Captains’ arguments, which is that there was no express or implied agreement
5 to exclude sleep or meal periods from the hours that the Captains worked. In fact,
6 the declaration supports the Captains’ position, because it states that the fixed
7 weekly rate includes sleep and mealtime. ECF No. 40-5 at 4. Because the fixed
8 weekly rate includes sleep and mealtime, those hours constitute hours worked. 29
9 C.F.R. § 785.22(a). Chief Kuhman’s contentions regarding “extra compensation”
10 for these periods is irrelevant for the purposes of determining the Captains’ number
11 of hours worked in a workweek. The Court finds no genuine issue of material fact.
12 Therefore, the Court grants summary judgment on this issue to the Captains, and
13 MSA’s affirmative defense on sleep and meal periods is dismissed.

14 CONCLUSION

15 Accordingly, **IT IS HEREBY ORDERED:**

16 1. Plaintiffs’ Motion for Partial Summary Judgment, **ECF No. 36**, is
17 **GRANTED in part** and **DENIED in part**.

18 2. Defendant’s Motion for Summary Judgment, **ECF No. 38**, is
19 **GRANTED in part** and **DENIED in part**.

20
21 ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS’
MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART
AND DENYING IN PART DEFENDANT’S MOTION FOR SUMMARY
JUDGMENT ~ 52

3. The Captains are, and have been, eligible for overtime pay under the FLSA and do not qualify for any exemption.

4. The Captains' overtime pay shall be calculated using the fluctuating workweek method.

5. The Captains' regular rate used to calculate overtime due shall be determined without regard to the additional straight time rate that the Captains received for working unscheduled overtime, and the straight time pay provided for work of unscheduled overtime hours is creditable as overtime pay.

6. Liquidated damages under 29 U.S.C. § 216(b) shall apply. The statute of limitations shall extend back two years.

7. MSA is not a public agency within the meaning of the FLSA and there is no express or implied agreement to exclude sleep and mealtime from the hours worked by the Captains. Therefore, MSA's affirmative defenses relating to section 207(k) and the exclusion of sleep and mealtime are dismissed.

IT IS SO ORDERED. The District Court Clerk is directed to enter this Order and provide copies to counsel.

DATED July 22, 2019.

s/ Rosanna Malouf Peterson
 ROSANNA MALOUF PETERSON
 United States District Judge